United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF & APPENDIX

75-1311

In the

United States Court of Appeals

For the Second Circuit

UNITED STATES OF AMERICA,

Appellee,

vs.

ANTHONY LORCHIAVO,

Defendant-Appellant.

On Appeal from the United States District Court for the Southern District of New York.

BRIEF AND APPENDIX FOR DEFENDANT-APPELLANT

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Defendant-Appellee.

- x

APPELLEE'S BRIEF

Preliminary Statement

The defendant-appellee, Loschiavo, adopts the accurate preliminary statement which appears in the brief of the United States.

Proceedings Below

On May 5, 1975, the last day of his parole, Loschiavo brough the instant motion (A 3-9)* to vacate the bribery conviction under Title 28, United States Code, Section 2255, on the ground that the public official he was convicted of bribing was not a federal public official as defined in 18 U.S. §201. On June 17, 1975,

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* References with the prefix "A" are to the Appellee's Appendix, while those with the prefix "G" and the suffix "a", are to the Government's Appendix. References with "Tr." are to the stenographic transcript of the trial. Government's exhibits are cited "GX". References to Government's Brief are in the form "G.Br.".

Judge Metzner, relying on this Court's decision in United States v. Del Toro, 513 F 2d, 656 (Decided February 27, 1975), cert. denied, 44 U.S.L.W. 3185, (October 6, 1975), granted the motion.

Statement of Facts

The facts relevant to this appeal are undisputed. Loschiavo was found guilty of bribing officials of the New York City Model Cities Administration. The testimony adduced during the trial was that Loschiavo was approached by Pedro Morales, a city employee, to make a payment of $15,000.00, in order to obtain a lease from the City of New York. Loschiavo at first refused to make such payment and, eventually, through the intervention of Storns, the contractor who would renovate the building, agreed to make the payment. According to the testimony, Morales was a city employee who could recommend a site to his superior, John Sanders, another city employee. The final recommendation with reference to the site would be made by Judge Williams, who at that time was the Model Cities Administrator for the City of New York. His recommendation was then referred to the New York City Department of Real Estate.

Prior to making this recommendation, since this particular program involved sanitation, Wittie McNeil, an Assistant Commissioner of New York City Sanitation Department, determined whether or not the premises in question would meet the requirements of the New York City Department of Sanitation. In addition to the New York City Department of Sanitation, Donald Shea, who was an employee of the New York City Bureau of the Budget and was assigned to the Model Cities Administration as an expediter for the Mayor's task force, also reviewed an approved the property. Both the Assistant Commissioner of Sanitation and the representative of the Bureau of the Budget testified that the building to be leased by the City was a suitable one for the purposes of the Sanitation Department and that, in fact, said building was the best that had been seen by the expediter for the Mayor for the purposes of the Sanitation Department.

Michael Palumbo, who was employed by the City of New York Department of Real Estate, testified with reference to his Department's role in negotiating the lease for the premises. He stated that before the lease could be entered into, the New York City Board of Estimate,

by resolution, must approve said proposed lease. The Corporation Counsel of the City of New York represented the City of New York in the preparation and execution of said lease.

The leased premises, 30,000 square feet, according to the testimony of the city employees, was leased at a fair and reasonable rental; namely, $1.50 per square foot. An additional payment was given to Loschiavo in order to renovate the building according to the specifications of the New York City Department of Sanitation. Witnesses testified that this additional payment to be made over the five-year term of the lease was proper as it was more practical and expeditious for the owner to do the renovati-n rather than the City of New York.

The lease (GX3) was executed between Loschiavo and the City of New York "... to be used by the Model Cities Administration for their sanitation program or for such other purposes as the Board of Estimate may determine, ...". (Emphasis added). There was testimony that the United States Department of Housing and Urban Development (HUD) funds were not contemplated for the full five years of the lease.* The United States Department of

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* At "G.Br.7" it is stated that (HUD) "... in fact approved the lease in question." The statement is inaccurate.

Housing and Urban Development (HUD) is not mentioned in the lease, nor in the New York City Board of Estimate resolutions appended to the lease. Rent was paid by the City of New York to Loschiavo and vouchers were kept by the City for said payments (GX9). No mention of HUD is made on the check or voucher.

The testimony the representative of HUD disclosed that his agency had nothing to do with the hiring of personnel of the New York City Model Cities Administration; hiring of personnel was left to the local government. (Tr.205) * The testimony further disclosed that if funding for the Model Cities Administration was not continued for the term of the lease, the City of New York would replace it with another City Agency or sub-lease it to someone else.(Tr.284)

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* At the Del Toro trial, the representative of HUD, who also testified in the Loschiavo trial, was questioned as follows:

"Q I don't want you to get off on a subject which isn't relevant. Did you have the right to hire or fire Mr. Morales?

A No." (App., 95; Tr. 430)

* * *

"Q He was in fact a city employee; is that right?

A City employee." (App. 96; Tr. 431)

At the trial, after colloquy with the Court and, after discussion with Loschiavo, Counsel did not contest that the Model Cities Administration employees were public officials of the United States acting in their official capacities in connection with the subject lease. (A 1,2) During the trial, it was disclosed that HUD financed 100% of the cost of the project activities and 80% of the cost of administering the program. On appeal, this specific issue was not raised. The Circuit Court affirmed without opinion. 593 F2d 1399 (1974). In Loschiavo's petition for certiorari the public official question first was raised. The Supreme Court denied certiorari 419 U.S.872 (1974).

On May 6, 1974, Loschiavo surrendered. He was placed on parole on October 29, 1974. The last day of his parole was May 5, 1975.

Immediately, following the publication in the New York Law Journal of the announcement of the decision of the Court in United States v. Del Toro, 513 F 2d 656 (2 Cir.), negotiations were commenced with the United States Attrorney for vacating Loschiavo's conviction. The United States Attorney was agreeable to consent to

the vacating of the conviction of bribery, if Loschiavo would plead guilty to an open perjury count which Judge Metzner had dismissed. The United States Attorney had served a notice of appeal, appealing Judge Metzner's dismissal. Negotiations were unsuccessful and the instant motion to vacate the bribery conviction was brought. On May 13, 1975, for failure to process the appeal, the Circuit Court of Appeals dismissed the Government's appeal of Judge Metzner's order dismissing the perjury count.

POINT I

LOSCHIAVO'S CLAIM MAY BE PROPERLY CONSIDERED IN § 2255 PROCEEDING

On May 5, 1975, when the instant motion was filed, Loschiavo was still on parole. [Jones v. Cunningham, 271 U.S. 236 (1963)]. The lapse in time from the decision in Del Toro until the filing of motion is understandable, in view of negotiations with the Government as described in Loschiavo's affidavit. (A 4-7)

The Government concedes that if the Court finds this proceeding is barred because Loschiavo was not in custody, that the dismissal on this basis would be a "futile gesture", and by implication consents to the Court giving consideration to this proceeding. ("G.Br.10)

Following the colloquy (A 1-2) in Court prior to the charge and waiver transmitted to Court's law clerk, no objection was taken to the District Court's charge (G a 9) that Morales and Sanders were public officials of the United States, acting in their

official capacity. On direct appeal, the question of their being public officials was not raised.* Jurisdiction on appeal was questioned only on the basis that there was no federal privity between Loschiavo's actions and the United States Government.

As stated in United States v. D'Amato, 507, F 2d 26 (2 Cir. 1974), "On occasion a prosecution is completed under a statute that everyone, including defense counsel and trial court assumes to be applicable." Cf. United States v. Franklin National Bank 512 F 2d 245 (2 Cir 1975). Not only does such a situation arise in the Circuit Court but also in the Supreme Court of the United States. In Todd v. United States, 158 United States 278 (1895), the Supreme Court recognized a serious question which was not considered in the briefs, and requested briefs from both sides on a point not raised below. The case involved a prosecution for threats to witnesses in a matter before the Commissioner of the Circuit Court of the United States.

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* The defendants in Del Toro petitioned for certiorari. The Government did not cross petition for review of the dismissal of the bribery conviction.

The Supreme Court found that a commissioner was not judge under the statute. The Court stated at p. 282:

> "It is axiomatic that statutes creating and defining crimes cannot be extended by intendment, and that no act, however wrongful, can be punished under such a statute unless clearly within its terms. 'There can be no constructive offenses, and, before a man can be punished, his case must be plainly and unmistakably within the statute.' U.S. v. Lacher, 134 U.S. 624, 10 Sup. Ct. 625;End. Interp. St. (2d Ed.) § 329; Pom Sedg. St. Const. Law. 280."

In the light of the very thorough analysis in United States v. Travers, 514 F 2d 1171 (2 Cir. 1974), and its review of Sunal v. Large, 332 U.S. 174 (1974), Davis v. United States, 417 U.S. 333 (1974) Gosa v. Mayden, 413 U.S. 665 (1973), O'Callahan v. Parker, 395 U.S. 258, upon which the Government relies and the reconciling by Travers of United States v. Ligoari, 438 F 2d. 663, with Sunal, Travers leaves open the question at p. 1177, "... we leave to another day the determination of the proper result when less has been done."

The key witness in the Loschiavo and Del Toro cases was Morales. The HUD representative who testified

in Loschiavo also testified in Del Toro. There was no question that 80% of Morales' salary and 100% of the cost of the program were federal funds.

The District Court on this motion ruled as follows: (Ga 12)

> "The Government opposes the application, attempting to distinguish the facts in Del Toro from those in this case. It is also argued that Loschiavo waived this issue at trial.
>
> There is no valid distinction between Del Toro case and movant's case on the key issue of the nature of Morales' employment. Since this court did not have jurisdiction over the crime charged, the conviction must be vacated. The charge on the jurisdictional element was, in light of Del Toro, a plain error which clearly affected substantial rights of the movant. It may therefore be considered at this juncture even though not raised at trial." Fed. R. Crim. P 52(b).

The Government has admitted at (G.Br.28) that "... there is not a substantial amount of case law in this area and no other courts to date have had occasion to consider whether "city" employees precisely in Morales' position may be considered federal public officials for purposes of the bribery statute ..."

In view of that statement and the colloquy, it is submitted that there was no deliberate by-pass of the regular procedures.

On appeal, no opinion was written. The appeal was disposed of by summary order. In accordance with the reading of Rule 0.23, Rules of the United States Court of Appeals for the Second Circuit, the panel believed that "no jurisprudential purposes would be served by a written opinion."

In Del Toro, the Second Circuit specifically reviewed the key question as to whether a city employee in the status of Morales was a public official within the meaning of Title 18 U.S. 201. It would not be harmful to the administration of justice in an intra-circuit situation which covers the status of Morales, who was also a key witness in Loschiavo and Del Toro to consider Del Toro new law. The government in its request for en banc hearing recognized the position that Loschiavo is setting forth.

The government further takes the position that Loschiavo has already completed his service, and that although Loschiavo may allege now that his conduct was not criminal under federal law, it was criminal at least under state law. Travers, supra P 1178, responded to this statement. As stated in United States v. Morgan, 346 U.S. 502, 512-513;

> "Although the term has been served, the results of the conviction may persist. Subsequently, convictions may carry heavier penalties, civil rights may be affected."

Finally, in light of United States v. Archer, 486 F 2d 670 (2 Cir. 1974) and Rewis v. United States, 401 U.S. 808 (1971), extension of federal prosecution should be closely monitored. It is significant in this respect to refer to the testimony that was introduced in the Del Toro trial. It refers to Grand Jury testimony of defendant Kaufman being examined by the Assistant United States Attorney on February 2, 1973, at or about the same time that this Grand Jury was considering Loschiavo.

* * * *

"Q Did you want to change your testimony about that, did Mr. Morales ask you for any money?

"A Well, I would change my testimony in the light of your questioning. Mr. Morales did ask me for money.

"Q Do you want to tell us about that?

"A Well, he was talking about $15,000 and I told him I would take it up with the company and see if I can get it but nothing happened.

"Q You realize of course that if that in fact happened, if Mr. Morales offered you money or asked for money, he was at that time committing the crime of bribery under State law?" (Tr. 739; emphasis supplied).

* * * *

It is respectfully sumitted that under all the circumstances of this case, and the overextension of the prosecution in bringing state cases into the federal court, and the willingness of the prosecution to bargain away the bribery conviction as appears in Loschiavo's affidavit (A 4-7), Loschiavo's application under 2255 be affirmed.

POINT II

A NEW YORK CITY MODEL CITIES ADMINISTRATION EMPLOYEE IS NOT WITHIN THE SCOPE OF 18 U.S.C. 201

Morales was not a "... person acting for or on behalf of the United States ... in (an) official function under or by authority of (a) department" of the Federal Government.

As stated in Del Toro, supra 662 "... there are no decisions holding city employees like Morales to be public officials." The Government in its brief (G.Br. 28,29) refers to cases which the Del Toro, supra 662, held inapposite; namely, United States v. Levine, 129 F 2d 745 (2 Cir.1942) and Harlow v. United States, 301 F 2d 361, 370 (5 Cir.1962). In addition, at (G.Br. 30,31) reference is made to two cases,

(rejected by Del Toro), under federal fraud statutes involving obtaining funds by fraudulent means, United States ex rel Marcus v. Hess 317 U.S. 537 and United States v. Candella, 487 F 2d 1223 (2 Cir. 1973), Cert. denied 415 U.S. 977 (1974). The Hess and Candella cases both involved affidavits or forms submitted to the Government which clearly put defendants on notice of federal penalties.

The additional cases cited by the Government are inapposite; namely, Kemler v. United States, 133 F 2d 235 (1st Cir. 1942), in which a physician was appointed by a U.S. Selective Service Board to examine registrants; Sears v. United States, 264 F 257 (1st Cir 1920) in which Government employed inspectors were placed in a shoe plant and had come under the Civil Service Act; and Whitney v. United States, 99 F 2d 327 (10th Cir. 1938) in which the Osage Indian Agency was under the Secretary of Interior and the clerk had civil service status with the Government for 12 years, 10 1/2 years of which was with the Indian Agency.

As clearly revealed in the statement of facts, many city employees were involved in making the decision

as to the acceptance of a lease of Loschiavo's premises. The Government is accurate in that a sum of federal money was committed to a sanitation program in East Harlem, however, there was never any federal approval of a lease negotiated with Loschiavo.

Even though there were federal committed funds to the City of New York, does that mean that any one of a number of city employees who may have been involved in the bribery - Morales, the Assistant Commissioner of Sanitation, the employee of the City Budget Bureau, the representative of City Department of Real Estate or even a member of the Board of Estimate - could be indicted by a federal Grand Jury for bribery involving the lease of Loschiavo's premises?

In addition, the lease (GX3) reveals that not only was the lease for the purposes of the Model Cities Administration, but also for any purpose determined by the New York City Board of Estimate. Furthermore, HUD funds would not be available for the full term of the lease.

The Court in Del Toro at p. 622, felt the need for a close scrutiny in view of the healthy regard for the federal system of divided powers, as well as for the accepted doctrine that "ambiguity concerning the amLit of criminal statutes should be resolved in favor of lenity, Rewis v. United States, 401 U.S. 808, 812 ..." The Court further felt the need in discerning Congressional interest to consider whether an expansive interpretation of the statute in the light of the concern of Rewis for altering federal state relationships and overtaxing federal police resources. The Court, after close scrutiny, then found that Morales was not a public official.

In view of the extended analysis by the Government of legislative history, Congressional hearings, and purposes of 18 U.S.C. 201, in an attempt to change the result of Del Toro, it is best to refer to Bell v. United States, 349 U.S. 81, 83, in which Justice Frankfurter stated as follows:

> "About only one aspect of the problem can one be dogmatic. When Congress has the will it has no difficulty in expressing it -- when it has the will, that is, of defining what it desires to make the unit of prosecution and, more particularly, to make each stick in a faggot a single criminal unit. When Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity."

CONCLUSION

The order of the District Court should be affirmed.

Respectfully submitted,

MORTIMER TODEL
Attorney for the Defendant-
Appellee

that point. What may have been in his mind at that point he has testified to.

THE COURT: Well, I know that, but I am talking about the justification for submitting an entrapment defense to the jury and I can't see it on the testimony in this case. But I will think about it over the week-end.

My second question to you, Mr. Todel, is, are you disputing that Sanders or Morales were public officials of the United States?

MR. TODEL: I say there hasn't been any proof with reference to that, your Honor. All that there has been proof of is that they are not.

THE COURT: No, but they are paid by the government.

MR. TODEL: But they are employed, and I think I brought out that actually the HUD, or Mr. Torres --

THE COURT: I just want to know because then I am going to charge it but I was trying to leave out two pages of involved charge to this jury.

Now, I will tell them that these men are paid by the federal government, and they may take that into consideration in determining whether they are public officials of the federal government, but it takes a long explanation of this, and if you want it to go in, I will

put it in, but if you don't, I would appreciate your telling me because this charge is long as it is, as you know, because of the involved conspiracy count that the government threw in there. It is the worst, botched-up job that I have ever seen. Half the stuff doesn't belong in it and it is unnecessary to the count, but I have to charge it.

MR. TODEL: May I discuss this with my client?

THE COURT: I don't want to press you.

MR. TODEL: I know.

THE COURT: You can talk about it and call me this afternoon. It is just a question of -- well, it is done, and it is written up, and I worked on it last night, but it just makes the charge that much longer in a large charge to the jury.

If you want it in it will stay in but I didn't quite understand from the attitude you took on cross-examination of the man from HUD that you were really, after he put in the record how the money came in, that you were really contesting that issue.

That is why I put it to you. If you are, fine.

MR. TODEL: I will speak with your law clerk this afternoon on that, your Honor.

THE COURT: All right. Thank you.

APPELLEE'S MOTION IN THE DISTRICT COURT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - -x

UNITED STATES OF AMERICA

- against -

ANTHONY LOSCHIAVO,

Defendant

- - - - - - - - - - - - - - - - - - -x

Index No. 73 Cr. 290

NOTICE OF MOTION FOR VACATING JUDGMENT OF CONVICTION AND SENTENCE UNDER TITLE 28 USC2255

S I R :

PLEASE TAKE NOTICE that upon the annexed affidavit of ANTHONY LOSCHIAVO, sworn to the 5th day of May, 1975, the affidavit of MORTIMER TODEL, sworn to the 5th day of May, 1975, and all the proceedings heretofore had herein, a motion will be made before the HONORABLE CHARLES M. METZNER of this Courthouse, Foley Square, New York, New York, at a time convenient to the Court for an order pursuant to Title 28 USC. 2255 vacating judgment of conviction and sentence heretofore imposed on December 11, 1973, and for such other and further relief as to the Court may seem just and proper.

Dated: New York, New York
May 5, 1975.

Yours, etc.,
Mortimer Todel
MORTIMER TODEL
Attorney for Defendant
One Rockefeller Plaza
New York, New York 10020

TO:

PAUL CURRAN
United States Attorney for the
Southern District of New York
United States Courthouse
Foley Square
New York, New York

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - -x

UNITED STATES OF AMERICA

- against -

ANTHONY LOSCHIAVO, AFFIDAVIT

Defendant

- - - - - - - - - - - - - - - - - - -x

STATE OF NEW YORK)
: S.S.:
COUNTY OF NEW YORK)

ANTHONY LOSCHIAVO, being duly sworn, deposes and says:

This affidavit is submitted in support of a motion to vacate judgment of conviction and sentence.

On April 4, 1973, an indictment was filed against me in this Court charging me in 4 counts of the following crimes; conspiracy, bribery, and two counts of perjury. I pleaded not guilty to said indictment.

On October 24, 1973, I went to trial and on October 30, 1973 the jury found me guilty of bribery, acquitted me of conspiracy and one count of perjury, and failed to reach a verdict as to the other perjury count.

On December 11, 1973, [illegible] Court sentenced me to imprisonment for one year and a $5000.00 committed fine. I appealed my conviction to the Circuit Court of Appeals. No opinion was rendered by the Circuit Court in affirming the conviction, and judgment was entered on March 14, 1974.

On April 8, 1974, I petitioned for a writ of certiorari to the Supreme Court of the United States.

Certiorari was denied by the Supreme Court on October 15, 1974.

In view of the opposition of the Government to my request for a stay pending my appeal to the Supreme Court, I commenced my sentence on May 6, 1974. In addition I paid the committed fine of $5000.00. I was released on parole on October 29, 1974. My parole ends today, May 5, 1975.

On March 3, 1975, my attorney Mortimer Todel notified me that in the New York Law Journal there appeared on that date a report of the decision of the Court of Appeals - Second Circuit, reversing the bribery conviction in the case of United States v. Del Toro and Kaufman. Said case had been tried in this Court before the Honorable Whitman Knapp. Said case involved the bribery of an employee, Pedro Morales, of the Model Cities Administration of the City of New York. Mr. Morales was the main witness against me in my trial.

Mr. Todel did not represent me on my appeals; however, he was in close contact with me during my incarceration and represented me in negotiations with the City of New York during my incarceration and when I was on parole. I will describe these negotiations as it relates to this present application.

A few days later, Mr. Todel advise me of his conversations with the United States Attorney's office. Mr. Todel stated that if I sought to vacate the judgment of conviction and was successful, the United States Attorney would forward the case to the District Attorney of New York County for prosecution. In addition, the United States Attorney would appeal the dismissal of the perjury count which the Court had dismissed on February 24, 1975.

To say the least, I was in a state of utter despair and confusion. I had served my time in prison, had paid the $5000.00 fine; and in addition, Mr. Todel had negotiated a revision of the lease with the City of New York, whereby the City of New York was made whole with reference to $20,000.00 that had been paid to Model Cities employees.

I could not make up my mind what I wanted to do. I did not look forward to continued litigation, especially the emotional effect upon my family and myself. The United States Attorney then filed a notice of appeal on March 24, 1975 to appeal the dismissal of the perjury count.

Mr. Todel had further conversations with the United States Attorney's office which he related to me. The Government suggested that I appear before this Court and perhaps enter a plea to the perjury count and that the bribery conviction could possibly be vacated. In addition I would not receive any additional sentence other than the one I had received and for which I would get credit.

I felt that I wanted to see the Assistant United States Attorneys myself without Mr. Todel to try to convince them to change their minds. I saw both Mr. Giuliani and Mr. Kurianski and spent a considerable amount of time with them to no avail. There came a time I wanted to forget the whole thing and go along with their suggestion. My wife also felt I should do what the Government wanted me to do.

Finally, on May 2, 1975, Mr. Todel informed me that Mr. Giuliani advised him that the Government will not appeal the dismissal of the perjury count, instead the Government will seek a new indictment for perjury this week.

The one thing that sustained me after my conviction

and sentence was my complete frankness with my wife and children. My children although young, are old enough to understand. I have told then everything and have tried to impress upon them to do what is right in view of my bad experience.

Perhaps, I am too close to the situation. I cannot understand the Assistant United States Attorney's insisting that even though I have served time and made amends, that as they have said to Mr. Todel and to me, they want me to have a record.

I recall what Mr. Giuliani stated at my sentence that "there may be some very good arguments where in his situation he would not commit this crime again, that he should not be punished" but in this case he asked for a harsh sentence to deter others. I have been punished. The time in prison and on parole can never be returned to me.

My conscience tells me that this application should be made now, that it is the right thing to do now.

WHEREFORE, I respectfully request that the judgment of conviction and sentence be vacated.

Sworn to before me this
5th day of May, 1975.

Mortimer Todel

MORTIMER DEL
Notary Public, State of New York
No. 03-9349650
Qualified in Bronx County
Commission Expires March 30, 1976

Anthony LoSchiavo

ANTHONY LOSCHIAVO

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - x

UNITED STATES OF AMERICA

- against -

ANTHONY LOSCHIAVO,

Defendant

AFFIDAVIT

- - - - - - - - - - - - - - - - - - x

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

MORTIMER TODEL, being duly sworn, deposes and says:

I am the attorney for the defendant and make this application pursuant to Title 28 U.S.C. 2255 in support of the defendant's motion to vacate judgment of conviction and sentence.

On February 27, 1975, the Court of Appeals - Second Circuit reversed the conviction for bribery in the case of United States v. Del Toro and Kaufman. Two witnesses who testified in that case, Pedro Morales and Frank Torres, were the same important witnesses who testified against the defendant, Loschiavo. The Court held that Morales was not a federal public official within the meaning of the statute. I informed the defendant of the decision and in his affidavit he relates what has transpired from the time he learned of the decision.

It is respectfully submitted that this is a case in which the Government should join in the motion to vacate judgment of conviction and sentence.

WHEREFORE, it is respectfully requested that

defendant's motion be granted.

Mortimer Todel
MORTIMER TODEL

Sworn to before me this
5th day of May, 1975.

Sidney P. Lefton

SIDNEY P. LEFTON
Notary Public, State of New York
No. 31-2297550
Qualified in Nassau County
~~Certified in New York County~~
Commission Expires March 30, 1977

A 202 Affidavit of Personal Service of Papers — LUTZ APPELLATE PRINTERS, INC.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
aAppellant,

- against -

ANTHONY LOSCHIAVO,
Defendant- Appellee.

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF **NEW YORK** *ss.:*

I, **James A. Steele** *being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at* **310 W. 146th St., New York, N.Y.**

That on the **8th** *day of* **Dec.** *19* **75** *at* **1 St. Andrew Plaza, New York, N.Y.**

deponent served the annexed *upon*

Thomas J. Cahill

the **Attorney** *in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the* *herein,*

Sworn to before me, this **8th**
day of **Dec.** *19* **75**

Robert T. Brin

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1977

James A. Steele
JAMES A. STEELE